

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1488

To be argued by
JANE W. PARVER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1488

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES ARTHUR LEPORE and
GUISEPPE DEVIVO,

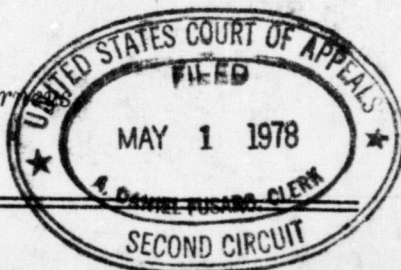
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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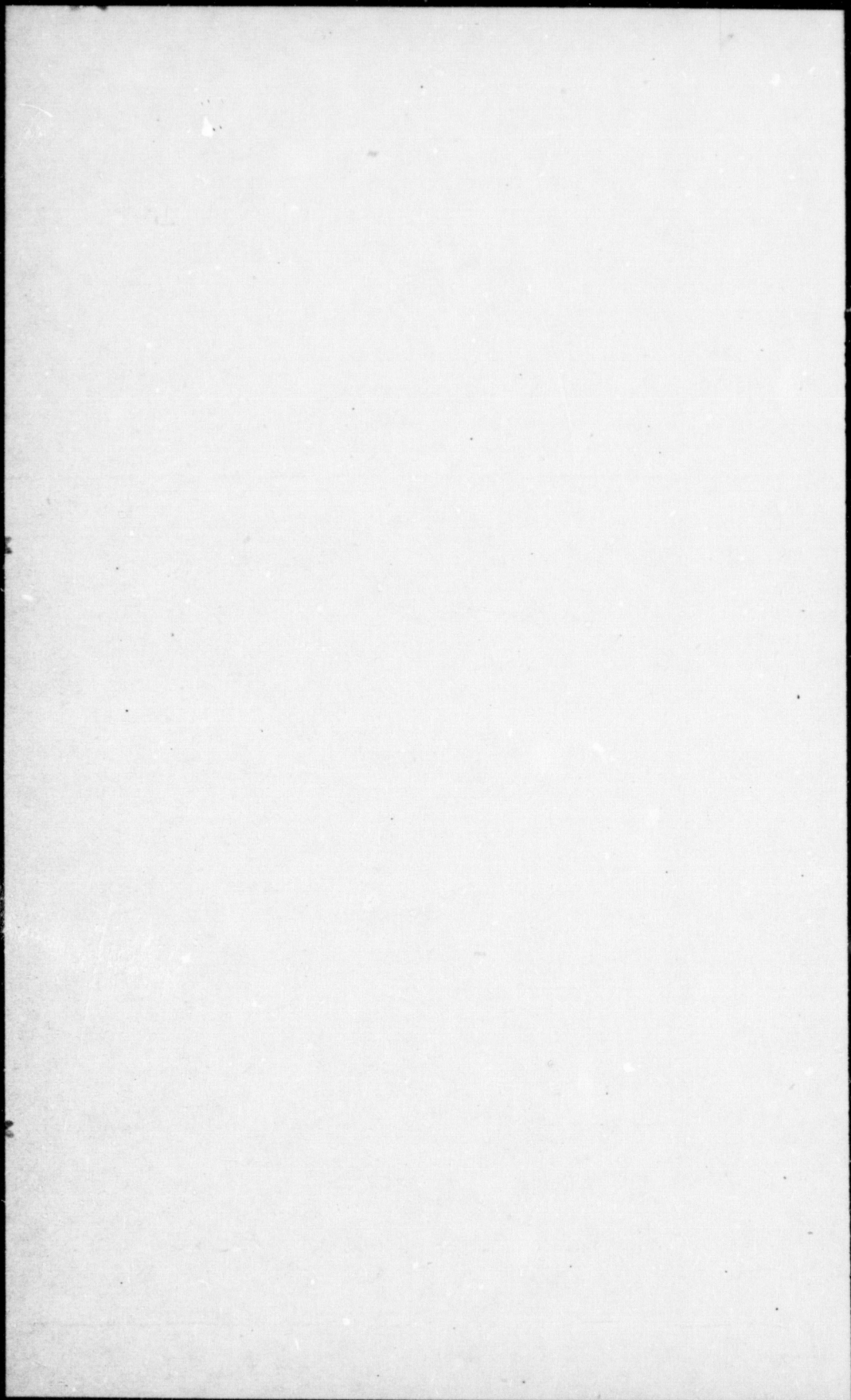


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JAMES ARTHUR LEPORE and GUISEPPE DEVIVO,
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

James Arthur LePore and Guiseppe DeVivo appeal from a judgment of conviction entered on November 4, 1977, in the United States District Court for the Southern District of New York, after a six-day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 77 Cr. 331, filed May 2, 1977, charged James Arthur LePore and Guiseppe DeVivo in Count One with conspiring to possess and to sell and transfer approximately \$2,000,000 in counterfeit \$100 federal reserve notes, in violation of Title 18, United States Code, Section 371. Counts Two and Three charged both defendants with the substantive offenses of keeping in their possession and of selling, transferring and delivering approximately 98 counterfeit \$100 federal reserve notes, in violation of Title 18, United States Code, Sections 2, 472 and 473.

The trial of LePore and DeVivo began on September 15, 1977, and concluded, after a one-day adjournment, on September 23, 1977, when the jury found Guiseppe DeVivo guilty of Counts One through Three and James Arthur LePore guilty on Count 3 and not guilty on Counts One and Two.

On November 4, 1977, Judge Owen sentenced DeVivo to a four year term of imprisonment on each of the three counts, the sentences to run concurrently. On the same day, Judge Owen sentenced LePore to four months imprisonment and twenty months probation on Count Three.

LePore is free on bail pending this appeal.

Statement of Facts

A. The Government's Case.

1. Summary.

The Government's proof established that DeVivo and LePore engaged in a scheme to sell counterfeit federal reserve notes in \$100 denominations. The evidence showed that DeVivo was the supplier of the counterfeit notes and that LePore helped him by delivering them to a government informant. During the conspiracy DeVivo and LePore participated in two sales of counterfeit notes—one involved \$9,800 in counterfeit, and the other \$100,100 in counterfeit.

2. Background of the Scheme.

In July, 1976, Robert Della Porta, who owned a construction and demolition business, was visited by the defendant DeVivo who sought to purchase used brick. DeVivo indicated that if Della Porta was interested, he, DeVivo, could provide any type of securities, including

counterfeit Government securities and that he had access to printing facilities. DeVivo also showed Della Porta some counterfeit gold coins. (Tr. 27-29, 31-33).*

In September or October, 1976, after Della Porta had begun to cooperate with the Government, he told DeVivo that he had a movie producer who was interested in obtaining two million dollars worth of securities to use as collateral for financing a production, and a meeting subsequently was arranged.** On December 16, 1976, DeVivo and LePore, who had been introduced previously to Della Porta as DeVivo's friend, met with Della Porta in front of 1619 Broadway, New York, New York.

DeVivo and Della Porta then went upstairs where DeVivo was introduced to Kobe Jaeger, a theatrical producer cooperating with the Government, and John Vezeris, a Secret Service agent posing as Jaeger's banker. Vezeris and Jaeger told DeVivo they wanted \$2 million dollars in counterfeit U.S. Treasury bills, in \$100,000 denominations, which their crooked Venezuelan banker could use as collateral to obtain financing for Jaeger's productions. DeVivo replied that he could arrange for the printing of \$2 million dollars worth of U.S. Treasury bills, at a price equivalent to 25% to 30% of the face value, but that he would need a genuine \$100,000 U.S. Treasury bill to serve as a pattern for the counterfeits, as well as a list of good serial numbers. While Jaeger and Vezeris stated they could supply the genuine bill and serial numbers, DeVivo did not agree to their demand that Vezeris be

* "Tr." refers to the trial transcript; "GX" refers to Government exhibit.

** Della Porta was indicted and arrested in August, 1976, in connection with a 1975 scheme involving counterfeit U.S. Treasury bills. He pled guilty in December, 1976, to conspiring to possess and distribute three counterfeit U.S. Treasury bills and was sentenced to two years probation in May, 1977. (Tr. 23-26).

present throughout the printing in order to safeguard the genuine bill. After the meeting broke up, LePore joined DeVivo and Della Porta outside and the latter two, in LePore's presence, continued to discuss for approximately 10 minutes whether Vezeris could be present at the printing of the counterfeit U.S. Treasury bills and whether they independently could obtain a genuine bill to serve as a pattern. (Tr. 33-39, 76, 167-175, 229-231).*

3. The Scheme Takes Shape.

Since the counterfeit U.S. Treasury bill deal had encountered substantial problems, DeVivo suggested to Della Porta that he had access to \$2 million worth of counterfeit federal reserve notes, in \$100 or \$20 denominations, which Jaeger might be able to use. The price to Jaeger was to be 10% of face value, with Della Porta to keep 2 points, or 2%, for himself. (Tr. 43-44).

* Following this discussion about DeVivo providing counterfeit U.S. Treasury bills, difficulties in consummating the deal developed. DeVivo and Della Porta had several meetings and phone calls during which DeVivo informed Della Porta that Vezeris could not be present at the printing, and suggested printing the counterfeit U.S. Treasury bills in a \$10,000 denomination, as a genuine \$10,000 bill, to serve as a pattern, might be easier to obtain. DeVivo further suggested to Della Porta that if the latter was successful in selling certain construction equipment that a friend of DeVivo had asked him to sell, the proceeds of the sale could be used to purchase the genuine U.S. Treasury bill. (Tr. 40-41, 78-79).

Finally, on January 13, 1977, DeVivo met again with Della Porta, Jaeger and Vezeris at Sardi's Restaurant in Manhattan. Jaeger and Vezeris agreed to the use of a \$10,000 denomination bill but the meeting broke up on an inconclusive note when Jaeger and Vezeris refused to advance DeVivo \$15,000 to purchase a genuine U.S. Treasury bill and supplies and further refused to loan DeVivo a real U.S. Treasury bill without being permitted to be present at the printing. (Tr. 42, 175-178, 231-232).

A short while later, in early February, 1977, DeVivo invited Della Porta out to his Fort Lee, New Jersey office, where he gave him a zerox copy of what appeared to be some type of commodities certificate and asked him to see if Jaeger and Vezeris would be interested. On February 11, 1977, Della Porta brought the certificate to the Secret Services offices, from where he and Vezeris telephoned DeVivo to inform him they were not interested. During the phone call, which was recorded (GX 1), Vezeris asked DeVivo about the counterfeit \$100 and \$20 bills, using the code words "ones" and "fifths". DeVivo replied that there was "none of that around" and then berated Della Porta for allowing Vezeris to talk of such things over the phone. The next day DeVivo told Della Porta that he refused to do any further business with Vezeris. Della Porta, however, assured DeVivo that he had someone else who also was interested in the counterfeit bills. (Tr. 44-50, 178-179, 232-233; GX 1).

4. The Sample and the March 9, 1977 Delivery of \$10,000.

At the end of February, 1977, DeVivo again invited Della Porta out to his New Jersey office, where this time he gave him a sample counterfeit \$100 bill, which Della Porta turned over to the Secret Service agents on or about March 1, 1977. (Tr. 50-51, 233-234; GX 2). A few days later Della Porta ordered \$10,000 worth of the bills, which he told DeVivo he would send to his people overseas; if the bills were good, he would order more. On March 9, 1977, DeVivo told Della Porta that that afternoon he would be bringing the \$10,000 over to Della Porta's construction site, at 30 East 76th Street, New York, New York. (Tr. 51-52).

At approximately 4 p.m. on March 9, 1977, LePore drove up to 30 East 76th Street in a brown Cadillac and emerged from the car carrying a white envelope in his

hand. He then put the envelope into his pocket and met Della Porta outside 30 East 76th Street. (Tr. 53-54, 187-188).

Once inside the building, Della Porta asked if LePore had something for him but LePore stated that the storefront area was too open and he didn't want to do it "here." * Della Porta stepped back a little and again inquired of LePore, who then handed the envelope to Della Porta, assuring Della Porta "it's all there". Della Porta ripped open the envelope, (GX 3), took out the bills and noted that it looked good, and they might be able to do more business. Della Porta then gave LePore \$800 in genuine money and directed him to tell DeVivo that he had taken his cut and that he'd let DeVivo know if he wanted to order more. (Tr. 54).

Despite the agreed-upon figure of \$10,000, LePore had delivered a total of \$9,800 on March 9, 1977. (GX 4, 4A, 4B). Secret Service agent James Gilmartin testified that all of the bills delivered by LePore were counterfeit and all were in \$100 denominations. A Government fingerprint expert testified that two latent fingerprints were found on two of the bills, GX 4A and GX 4B, both of which belonged to DeVivo. During the direct examination of the same fingerprint expert, LePore conceded that two of his fingerprints were on the envelope, GX 3, in which the bills were contained.** (Tr. 237-238, 241-243, 289-294, 298; GX 11).

* The Madison Avenue side of 30 East 76th Street, which was being remodelled as stores, had very large plate glass windows, approximately 6 feet by 8 feet. Secret Service agent John Orrizzi, who was standing on Madison Avenue observing Della Porta and LePore inside through the glass windows, testified that Della Porta had cleaned the windows prior to LePore's arrival. (Tr. 186-187).

** The envelope (GX 3) bore a Mohegan Variety Co. letterhead and a Fort Lee, New Jersey address, which was DeVivo's place of business. (Tr. 454-455).

5. The Delivery of the \$100,100.

Two weeks after the March 9, 1977 sale, Della Porta ordered an additional \$100,000 in counterfeit money. On March 29, 1977, DeVivo told Della Porta that he would deliver it the next day to Della Porta's construction site, the International House of Pancakes, in Queens, New York. (Tr. 55-56).

On March 30, 1977, both DeVivo and LePore arrived at the International House of Pancakes.* While the three men were having breakfast Della Porta asked DeVivo if he had the package for him. DeVivo said yes and in turn asked Della Porta if he had some money, to which Della Porta replied that one of the people he was doing business with was outside with the money. DeVivo and Della Porta then went outside. DeVivo opened the trunk of LePore's car and took out two boxes, one a Farberware electric grill and one a small brown box. (GX 6). DeVivo brought both boxes over to Della Porta's car, where they were placed in the trunk. When Della Porta felt the small brown box, DeVivo told him to "leave it, it was all there". A short while later LePore and DeVivo were arrested. (Tr. 56-57, 193-195).

Secret Service agent George Magee testified that after being notified of the arrests, he obtained the small brown box, GX 6, from the trunk of Della Porta's car and opened it. Inside were \$100,100 in counterfeit \$100 federal reserve notes, (GX 7, 7A, 7B, 7C), which were similar to those previously delivered by LePore on March 9, 1977. (Tr. 275-284). On direct examination of the Government's fingerprint expert, DeVivo conceded that his fingerprints appeared on three of the counterfeit \$100 notes, GX 7A, 7B and 7C. (Tr. 298-300).

* The brown Cadillac driven by LePore was registered to LePore. (GX 14A and 14B).

B. The Defense Case.

DeVivo testified in his own behalf, denying that he ever had seen counterfeit money, had discussed counterfeit money with anyone, or had given counterfeit money to Della Porta. (Tr. 476, 488-489).

According to DeVivo, he first met Della Porta in the summer of 1976 but did not see Della Porta again until November, 1976. At that time he sought to enlist Della Porta's help in selling some construction machinery owned by his friend, Joseph Giancarlo, since Mr. Giancarlo was permitting him to invest the proceeds of the sale back into his wholesale business, the Mohegan Variety Company. DeVivo testified that at the end of January, 1977, Della Porta agreed to rent one of these machines to use to remove snow at the Newark, New Jersey airport, at a price of \$500 per week plus \$1,000 in transportation costs. DeVivo further stated that in connection with this agreement, on or about March 4, 1977, Della Porta gave him \$1,000, consisting of ten \$100 bills, which DeVivo counted, put in an envelope and filed in a file drawer. According to DeVivo, three days later he received a phone call from Della Porta demanding his money back. DeVivo therefore gave LePore the envelope to bring to Della Porta and told LePore to retrieve the papers relating to the machinery from Della Porta. (Tr. 463, 465-467, 476-485).

DeVivo admitted twice meeting Kobe Jaeger and John Vezeris, but denied ever discussing counterfeit money or securities with them. It was DeVivo's testimony that both meetings took place in February, 1977, and that he went to both only because each time Della Porta had told him there would be a party, with women, but there had been no parties. (Tr. 485-492).

With respect to the events of March 30, 1977, DeVivo testified that Della Porta had asked him to take a Farberware electric grill he had purchased from DeVivo out to

his construction site, so they could also discuss some machinery. According to DeVivo, he had LePore put the Farberware grill box into the trunk of LePore's car and both men then went to the International House of Pancakes, where they had breakfast with Della Porta. After breakfast Della Porta and DeVivo went outside to get the grill. DeVivo testified that Della Porta picked up the grill box from the trunk of LePore's car and placed it in the trunk of his own car. DeVivo denied ever seeing the small brown box, GX 6, denied seeing two boxes in LePore's car trunk, and stated that he did not know how some of his fingerprints got on some of the \$100,100 in counterfeit bills found in GX 6. (Tr. 499-506).

DeVivo also called Joseph Giancarlo, who testified he had given DeVivo construction machinery to sell, that he had met Della Porta twice in connection with the machinery, and that he told Della Porta he would have to pay \$1,000 to cover the cost of transporting one of the machines to Long Island. On cross-examination, Giancarlo admitted that he was a partner in DeVivo's business and that DeVivo had no prior experience with construction or construction machinery. (Tr. 318-320, 322-323, 325-326).

LePore was the only witness on his behalf. LePore stated that he first met DeVivo in late 1974 but did not see him again until late November, 1976, when DeVivo gave him a job as his driver; his only other responsibilities were to answer the telephone and make a few pickups. According to LePore, he had worked previously as a bodyguard, in New York and Florida, and had tried unsuccessfully to establish a pest extermination business in California. (Tr. 334-336, 339-342).

LePore testified that he had met Della Porta perhaps five times but never spoke with him after the initial hello. LePore stated that in December, 1976, he had

driven DeVivo to New York City for what DeVivo thought was to be a party, that he waited an hour and that DeVivo then told him there was no party. (Tr. 343-344, 347-348, 351).

With respect to March 9, 1977, LePore testified that DeVivo told him Della Porta wanted his \$1000 returned, and that DeVivo had taken a sealed white envelope from an office file drawer and that he had brought the envelope to Della Porta at 30 E. 76th Street in New York City. According to LePore, Della Porta asked if LePore had brought his money, ripped a corner of the white envelope open and looked inside, without taking anything out. LePore then stated that Della Porta in turn handed him a sealed envelope, which Della Porta said contained documents for machinery, to take to DeVivo. (Tr. 356-362).

LePore also testified that on March 30, 1977, DeVivo asked him to put the Farberware grill box in the trunk of LePore's car, which he did, and the two of them went to the International House of Pancakes where they met with Della Porta. LePore testified that he had placed only the Farberware box in his trunk, that there were no other boxes in the trunk, and that he had locked the trunk and kept custody of the keys until giving them to DeVivo inside the restaurant, immediately prior to DeVivo and Della Porta going outside. LePore further testified that he had never seen the small brown box, GX 6, which held the \$100,100 and that he had never seen or discussed counterfeit money. (Tr. 368-373, 375, 391-393).

LePore admitted that in 1975 he had been convicted of passing three bad checks. (Tr. 332-334).

C. The Government's Rebuttal Case.

Secret Service agents Vezeris, Gilmartin and Orrizzi, all of whom testified on the Government's direct case, also testified briefly on rebuttal.

With respect to March 9, 1977, agent Gilmartin testified that when he had given agent Orrizzi \$1,000 in genuine money [to give to Della Porta to pay for the counterfeit \$10,000] it was not contained in any envelope. Agent Orrizzi testified that when he gave the same \$1,000 to Della Porta it was not contained in anything and that his grand jury testimony—that he gave Della Porta the genuine money in an envelope and then saw Della Porta hand that envelope to LePore—was a mistake. (Tr. 528-529, 532-534).

Agent Vezeris testified that while he was on surveillance duty on March 30, 1977, he saw DeVivo leave the International House of Pancakes, open the trunk of LePore's Cadillac, remove two boxes, one of which was GX 6, and bring them over to Della Porta's car. (Tr. 554-556).

ARGUMENT

POINT I

The District Court Properly Submitted Counts Two And Three To The Jury.

LePore argues that the District Court committed reversible error in submitting both Count Two and Count Three to the jury since the counts were multiplicitous and this led to jury "confusion and compromise, as a consequence of which they returned an obviously repugnant verdict . . ." (LePore Br. 18)*. LePore's argument

* "LePore Br." refers to the defendant LePore's brief on appeal.

is without merit, because Count Two, which charged a violation of 18 U.S.C. § 472, and Count Three, which charged a violation of 18 U.S.C. § 473, are not multiplicitous. In any event, LePore suffered no prejudice by the submission of both counts to the jury.*

First, the claim of multiplicity could have been raised prior to trial, and, therefore, the claim was waived by the failure to make a timely pretrial motion. The first time the issue was raised by LePore was after the Government had rested. According to Rule 12(b)(2), Fed. R. Crim. P., a motion based on a defect in the indictment *must* be raised prior to trial,** and pursuant to Rule 12(f), Fed. R. Crim. P., "failure . . . to raise . . . objections [to the indictment] which must be made prior to trial . . . shall constitute waiver thereof . . ." Thus, the issue has been waived and should not be reviewed on appeal. *United States v. Private Brands, Inc.*, 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958); *see United States v. Galgano*, 281 F.2d 908 (2d Cir. 1960), *cert. denied*, 366 U.S. 967 (1961).

In any event, LePore's claim that Counts Two and Three were multiplicitous must fail because each count

* Appellant DeVivo also adopts LePore's argument. (DeVivo Brief, p. 16). DeVivo was convicted on Counts One, Two and Three and was sentenced to four years on each count, to run *concurrently*. DeVivo's claim of prejudice is thus wholly without merit.

** Rule 12(b), Fed. R. Crim. P., provides in relevant part:

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * * * *

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

charged a separate offense. It is well established that Sections 472 and 473 are distinct statutory provisions, separately indictable, which do not merge for purposes of submission of the counts to the jury. *United States v. DiPalermo*, 340 F.2d 988 (2d Cir.), cert. denied, 381 U.S. 940 (1965); *United States v. Farina*, 193 F.2d 436 (2d Cir. 1951); *United States v. Farina*, 184 F.2d 18, 19 (2d Cir.), cert. denied, 340 U.S. 875 (1950). See also *United States v. Johnson*, 371 F.2d 800 (3d Cir. 1967); *United States v. Mercurio*, 254 F.2d 925 (7th Cir. 1958). This Court's opinions in *DiPalermo* and *Farina* make clear that Section 472 proscribes possession of counterfeit currency while Section 473 proscribes the sale, but not the possession of the counterfeit currency.*

Indeed, in the *Farina* cases this Court extensively considered arguments similar to those raised by the appellant LePore.** In those cases two of the defendants

* The *Farina-DiPalermo* opinions are clear that one can be indicted and convicted for possession in violation of § 472, and for the sale in violation of § 473. Judge Friendly's opinion in *United States v. Cioffi*, 487 F.2d 492 (2d Cir. 1973) explains in an analogous situation that one can be guilty of possession with intent to use or sell counterfeit postage stamps in violation of 18 U.S.C. § 501, and not necessarily guilty of violating 18 U.S.C. § 472, unless the intent to sell ripened into an attempt. Moreover, an attempt to sell without possession would justify a conviction under § 472, but not under § 501. The latter situation could arise when A, a middleman, sells B counterfeit owned and in the possession of C, and the counterfeit is delivered directly to B by C. *United States v. Cioffi*, *supra*, 487 F.2d at 496, n.3.

** The original convictions for violations of Section 472 and 473 were affirmed in *United States v. Farina*, 184 F.2d 18 (2d Cir.), cert. denied, 340 U.S. 875 (1950). Appellants' application for rehearing, on the grounds that multiple sentences were illegal, was denied in a full opinion, *United States v. Farina*, 193 F.2d 436 (2d Cir. 1951). Finally, this Court affirmed the denial of defendant's motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to set aside defendant's 15 year sentence under Section 472, on the grounds that possession merged into sale, in *United States v. DiPalermo*, *supra*.

were indicted for and convicted of conspiracy to possess and sell counterfeit, for possession of counterfeit in violation of 18 U.S.C. § 472, and for the sale of counterfeit on the same day as the possession in violation of 18 U.S.C. § 473. A third defendant—Sperdutto—was acquitted of possession, but convicted of the sale count (Section 473), and the conspiracy count. In considering the arguments raised concerning dual convictions under similar statutes, this Court held that Congress could properly make the very act of possession a separate crime and, therefore, a defendant may be indicted for and convicted of violations of counterfeit is only incident to the actual sale or delivery. 193 F.2d at 438. Thus the fact that possession, which is proscribed only by Section 472, is so closely related in time to the transfer neither bars submission of both counts to the jury nor requires that a conviction be set aside; instead, as the courts have repeatedly held, the sole prohibition is of cumulative sentencing for violations of Sections 472 and 473. *United States v. DiPalermo, supra*; *United States v. LaNovara*, 192 F.2d 259 (2d Cir. 1951). See also *Loraine v. United States*, 396 F.2d 335 (9th Cir.), cert. denied, 393 U.S. 933 (1968); *United States v. Mercurio, supra*.

Moreover, even where the proof of possession of counterfeit is that the possession was incidental to the sale, a defendant convicted of violating both sections 472 and 473 may still be sentenced under the fifteen-year provision of 472, provided, of course, that any sentence also imposed pursuant to the ten-year maximum of section 473 is concurrent. *United States v. DiPalermo, supra*; *United States v. Farina, supra*, 193 F.2d at 438 (concurring opinion of Judge Frank). Here LePore was only convicted and sentenced pursuant to the shorter time provisions of Section 473.*

* In contrast, in *Milanovich v. United States*, 365 U.S. 551 (1961), on which LePore relies, appellant was convicted of theft of government property as well as of receipt of the same stolen

[Footnote continued on following page]

Since this Court has held that Sections 472 and 473 charge separate offenses, the claim of multiplicity must fail and the Court need not determine whether the District Court abused its discretion in refusing to require the Government to elect between Counts Two and Three.* It bears considerable emphasis, however, that even assuming that Counts Two and Three were multiplicitous, LePore has suffered no prejudice by the submission of both counts along with the conspiracy count to the jury.

The District Court's power to require election is sparingly used, even where there are several counts involved, *United States v. Mamber*, 127 F. Supp. 925 (D. Mass. 1955), and necessitates a finding that the multiplicity is prejudicial either to the defendant or to the fair and orderly trial of the case. *Id.* at 927.** As one com-

property, both pursuant to 18 U.S.C. § 641. Although the Court of Appeals set aside the *shorter* sentence on the receiving count, on the basis that the intent of the statute was to punish one crime, not two, the Supreme Court by a bare majority, reversed the larceny conviction as well, noting also that defendant had received twice the length of sentence on the larceny count as had her co-defendant who had only been convicted of the larceny count; it was impossible to, therefore, surmise what sentence would have been imposed had defendant been convicted solely on one count. *Milanovich* is scant authority for LePore, however, because this Circuit has held, in contrast with *Milanovich*, that the two crimes do *not* merge, and also because LePore was convicted and sentenced solely pursuant to § 473, which has a *shorter* maximum sentence than does § 472.

* The question of whether to compel the Government to elect among multiplicitous counts is a matter purely within the trial court's discretion. *Pierce v. United States*, 160 U.S. 355 (1896); *Pointer v. United States*, 151 U.S. 396 (1894).

** In *Mamber* the defendant was charged with nine separate counts of false representations, all relating to the same word "none" which defendant had entered on a Marines Corps application in response to the question of whether he belonged to various organizations listed on an attached sheet. The nine counts referred to nine of those organizations. Despite the fact that the

[Footnote continued on following page]

mentator has noted, "The implication of these cases is that if the trial judge refuses to require an election, the jury may convict on the multiplicitous counts." 8 Moore's Federal Practice, ¶ 8.07(1), p. 8-51 (2d ed. 1977). Typically, the remedy to a multiplicitous indictment is to insure that cumulative sentences are not imposed, rather than to require a new trial.*

LePore was sentenced on Count Three to four months imprisonment. Since he was acquitted on Count Two, any problem of a multiple sentence on what was essentially a single crime was mooted. Moreover, the only claimed prejudice is LePore's speculative contention that the jury reached a compromise verdict by acquitting on Count Two and convicting on Count Three. As a practical matter, even if the jury compromised because of sympathy for LePore as DeVivo's middleman, the jurors' ability to compromise would not have been negated by the election of Count Two or Three. The jury had to consider—and would have had to consider even if there had

Government conceded the indictment was multiplicitous, Judge Wyzanski denied the defendant's motion to dismiss the counts or require the Government to elect among them. In *United States v. Ketchum*, 320 F.2d 3 (2d Cir. 1963), where the defendant complained of seven multiplicitous counts, this Court, in *dictum*, adopted the language of *Mamber*.

In contrast with the nine counts in *Mamber*, see also *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) (indictment contained thirty-two counts, twenty-nine of which were multiplicitous), which could conceivably have had a prejudicial impact, LePore here complains that one count was multiplicitous.

* As one commentator noted:

"Multiplicity . . . is an objection ordinarily raised on appeal or by post-conviction motion, since it challenges not the propriety of the prosecution itself but the imposition of cumulative sentences."

8 Moore's, Federal Practice ¶ 8.07[1], p. 8-47 (2d ed. 1977). (Emphasis added.)

been an election—Count One, the conspiracy count. The defendant offers no argument, and none would exist, that both the conspiracy count and either Count Two or Count Three should not have gone to the jury. Therefore, election would not have cured the sole area of potential prejudice LePore claims emanated from the multiplicitous indictment.

Moreover, the speculation that the jury may have compromised and therefore returned inconsistent verdicts is not legally cognizable prejudice. In *United States v. Zane*, 495 F.2d 683, 690 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974), this Court reiterated the rule that a jury verdict cannot be challenged as inconsistent:

"It is well-settled that even plainly inconsistent jury verdicts, simultaneously rendered are the jury's prerogative. The rule, as announced by Judge Learned Hand, in *Steckler v. United States*, 7 F.2d 59 (2d Cir. 1925), and as confirmed by Justice Holmes in *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932), is that consistency in jury verdicts is not required."

In *Zane*, *supra*, this Court therefore refused to disturb on appeal defendant's conviction for aiding and abetting the filing of a false annual report with the S.E.C., which conviction came only after the jury had, the day before, acquitted the defendant of conspiring to file the same false annual report with the S.E.C. and had been subsequently given a modified *Allen* charge. See also *Hamling v. United States*, 418 U.S. 87, 101 (1974); *United States v. Ordner*, 554 F.2d 24, 29-30 (2d Cir. 1977), *cert. denied*, — U.S. — (197...); *United States v. Handel*, 464 F.2d 679 (2d Cir.), *cert. denied*, 409 U.S. 984 (1972); *United States v. Catalano*, 439 F.2d 1100 (2d Cir.), *cert. denied*, 404 U.S. 825 (1971); *United States v. Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967); *United States v. Magnus*, 365 F.2d 1007 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967).

Similarly, in *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), where the trial court directed a verdict of acquittal with respect to the charge of conspiring to evade income taxes, the defendant was convicted by the jury of conspiring to obstruct the Treasury Department in the collection of revenues, a charge which defendant argued was identical to that of which he had been acquitted. In affirming the conviction, this Court recognized:

"The prosecution may allege the same charge in different counts with the protection that only a single penalty is permitted. When there are double penalties we reverse one, not both; and, as is well settled, a jury acquittal on one count does not require reversal of conviction on another count, even though there may seem a surface inconsistency. See e.g., *United States v. Nickerson*, 7 Cir., 211 F.2d 909, 911; *Barsock v. United States*, 9 Cir., 177 F.2d 141, 143; *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356, 80 A.L.R. 161; *Dealy v. United States*, 152 U.S. 539, 14 S.Ct. 680, 38 L.Ed. 545." 247 F.2d at 919.

As in *Klein* the acquittal on one count—Count Two—simply does not require reversal of the conviction on the other count.

POINT II

The Cross-Examination Of LePore Was Proper.

LePore claims that the Government's attempt on cross-examination to impeach LePore's exculpatory explanation at trial by showing that he failed to give the same explanation to the authorities after arrest impermissably exploited his post-arrest silence and was so improper as to constitute a violation of due process. (LePore Br. 19). LePore's argument is completely belied by the record

which shows that the question at issue did *not* seek to impeach the defendant's explanation at trial concerning the events with which he was charged. Therefore, this case clearly falls far outside the boundaries delineated by the Supreme Court in *United States v. Hale*, 422 U.S. 171 (1975) and *Doyle v. Ohio*, 426 U.S. 610 (1976).

There was no effort on the part of the prosecutor to suggest that the defendant remained silent after his arrest, and therefore his trial testimony was not to be believed. During the trial the defendant testified extensively about his employment history, and gave his explanation of the various events which the Government in its case claimed had established LePore's guilt. During his cross-examination the Government at no time suggested that LePore's silence after his arrest was inconsistent with his exculpatory trial testimony.* Instead, the issue of post-arrest silence arose only in connection with the defendant's personal employment history, and the challenged question was asked in response to a misleading and evasive answer given by LePore.

During LePore's direct examination he attempted to convey the erroneous impression that he was only a simple driver for DeVivo, following DeVivo's orders. (Tr. 340-342). Therefore, on cross-examination the prosecutor asked LePore about his post-arrest statement that he worked as a salesman for DeVivo, and said nothing about being a driver. (Tr. 408-409). To further demonstrate that LePore was not simply an innocent driver, the prosecutor pursued additional pedigree information.** She

* On the contrary, the jury was informed that following his arrest LePore had made certain explanations to law enforcement personnel. (Tr. 445-46).

** This Court has upheld the admissibility of pedigree information in the absence of *Miranda* warnings. See *United States ex rel. Hines v. LaVallee*, 521 F.2d 1109 (2d Cir. 1975), cert. denied, 423 U.S. 1090 (1976). Here of course LePore was given his *Miranda* warnings.

asked whether LePore had informed the agents that he had been a bodyguard. (Tr. 410). When LePore responded affirmatively, the Assistant asked whom he had been a bodyguard for, and when the defendant misleadingly responded that he didn't mention it, but "I did say I was working," the prosecutor *began* to ask the challenged question:

"Q. Isn't it a fact you refused to tell the agents—" (Tr. 410).

Before the question was completed, a side bar conference was held. Defense counsel moved for a mistrial or alternatively for a cautionary instruction. (Tr. 411). Judge Owen denied the mistrial motion, and gave a cautionary instruction even though the disputed question was never answered. (Tr. 414).*

Thus, the Assistant United States Attorney was only attempting to cross-examine LePore on his trial testimony as compared with the pedigree information he selectively gave to the agents. As we shall demonstrate, the facts in this appeal thus stand in sharp contrast to those in *United States v. Hale*, 422 U.S. 171 (1975) and *Doyle v. Ohio*, 426 U.S. 610 (1976) where the Supreme Court reversed convictions because the prosecutor in

* Judge Owen specifically instructed the jury as follows:

"Ladies and gentlemen, in connection with this last series of questions having to do with inquiry of Mr. LePore at the time of his arrest, I want to advise you that at such a time a person who has just been arrested obviously has no duty to say anything to anybody, has a right not to say anything to anybody and has no duty to say anything and obviously no inference can be drawn from the fact that at that time something is not said or a question is not answered and even if a person chooses to answer one question and not answer another question, there is no inference that may be drawn from that fact and I instruct you that, to apply that to this case and the evidence we are hearing."

fact had elicited the testimony that the defendant remained silent after his arrest, and did not give the agents the exculpatory story he testified to at trial.

Hale and *Doyle* involved fairly similar situations, in that defendants in both cases gave exculpatory explanations at trial and were then cross-examined concerning their failure to give such explanations at the time of their arrest. In *Hale*, the defendant, who was charged with robbing the complainant of \$96 and who was found in possession of \$158 at the time of his arrest, testified that the money found on him belonged to his wife, whose check he had just cashed. The wife also so testified. On cross-examination, however, the defendant was then forced to admit that he had not given this explanation to the police at the time of arrest but, instead, had remained silent in the face of their request for an explanation.* Similarly in *Doyle*, where the Government's proof rested almost entirely on an informant's testimony (the surveillance agents' view was blocked at critical points) the defendants admitted meeting with the informant but claimed it was to purchase marijuana from the informant, rather than to sell it to him. They further testified that

* This was particularly significant since the Government's case was not a strong one: the complainant's testimony was confused and contradictory and the defendant's flight at the time of arrest was of limited probative value since the defendant reasonably explained that his companion had heroin with him and he was afraid, since he had a prior narcotics conviction. Thus the defendant's possession of the money played a central part in the Government's case which the defendant attempted to meet through his alibi, which was corroborated by his wife. The defendant's admission that he had not given the same alibi to the police thus was calculated to break the critical point in the defense since it indicated the alibi was fabricated post-arrest. *United States v. Anderson*, 498 F.2d 1033 (D.C. Cir. 1974), *aff'd sub nom.*, *United States v. Hale*, 422 U.S. 171 (1975). That being so, the Government conceded that the cross-examination, if error, was not harmless.

at the last minute the informant framed them by having it appear that they had sold him substantial quantities of marijuana. On cross-examination the defendants were asked why they had failed to tell the arresting officers of the alleged frame-up, as well as other questions which suggested that if defendants were innocent they would have provided their explanation of a frame-up at a much earlier time.

In reversing the *Hale* and *Doyle* convictions, the Supreme Court expressly barred the use of a defendant's silence, in the face of questions after arrest and after the administration of *Miranda* warnings, as a means to impeach an exculpatory *explanation* subsequently offered at trial. Thus it is clear that cross-examination of a defendant about his immediate post-arrest failure or refusal to provide law enforcement officials with the same exculpatory explanation subsequently testified to at trial, since silence is itself inherently ambiguous, could have an "intolerably prejudicial impact". *United States v. Hale, supra*, 422 U.S. at 180. At the same time, the Court expressly approved the use of a post-arrest silence to impeach the defendant's testimony as to his own post-arrest behavior. *United States v. Doyle, supra*, 426 U.S. at 619 n. 11.

In the instant case, the prosecutor's aborted question did not suggest that the defendant's post-arrest silence was in any manner linked to the defendant's explanation of the events with which the defendant was charged. Indeed, as previously noted, the questioning concerned defendant's employment *prior* to any of the events in question. Thus, the prosecutor's question did not strike at the "jugular" of the defendant's story; in other words, the suggestion of a post-arrest silence was not an explicit attack on the defendant's version of the relevant facts. *United States v. Davis*, 546 F.2d 583 (5th Cir. 1977).

Indeed, in view of the overwhelming proof at trial, the fact that the disputed question was never completed nor answered, and the District Court's cautionary instruction, LePore is hard pressed to establish any improper prejudice from the question.* Unlike *Hale* and *Doyle*, at the very most, the jury only heard a fragment of a question, without the potentially prejudicial answer. *United States v. Lam Lek Chong*, 544 F.2d 58, 69 (2d Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977).** Moreover, the prosecutor thereafter moved on to another line of questioning and there was no reference whatever to any post-arrest questions or answers in the prosecutor's summation.*** *E.g.*, *United States v. Earl*, 529 F.2d 1145 (6th Cir.), *cert. denied*, 426 U.S. 938 (1976); *Hayton v. Egeler*, 555 F.2d 599 (6th Cir. 1977); *United States v. Williams*, 556 F.2d 65 (D.C. Cir. 1977). Finally, Judge Owen's immediate instruction to the jury, in the form specifically requested by defendant, promptly cured any possibility of preju-

* The Government's proof consisted of the testimony of Della Porta who had direct dealings with LePore. Surveillance agents Orrizzi, Gilmartin and Vezeris corroborated Della Porta's testimony, and Orrizzi and Gilmartin directly contradicted LePore's innocent explanation concerning March 9, 1977. LePore's fingerprint was found on the envelope containing the \$9800 of counterfeit money. The jury had the task of determining whether to believe LePore or Della Porta, Orrizzi, Gilmartin and Vezeris. It is unrealistic to suggest that the Assistant's half-asked question, which was never answered, could have had any impact on the jury, especially in light of the cautionary instruction, and the failure to raise the subject again. In view of this evidence, and the cautionary instruction, error had to be harmless, which is in marked contrast to the situation in *United States v. Hale*, *supra* and *Doyle v. Ohio*, *supra*.

** In contrast, in both *Doyle*, *supra*, and *Hale*, *supra*, the questions were asked and answered by defendants. Indeed, in *Doyle*, the defendants were directed to answer, over objection, a series of questions concerning their post-arrest silence.

*** Compare *Doyle*, *supra*, where the prosecutor explicitly argued the defendants' post-arrest silence to the jury. 426 U.S. at 614-615 n.5.

dice.* *E.g.*, *Jones v. Wyrick*, 542 F.2d 1013 (8th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); *United States v. Wycoff*, 545 F.2d 679 (9th Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977); *United States v. Williams*, *supra*.

POINT III

The District Court Properly Admitted Evidence of DeVivo's Conversations Relating To Other Counterfeit Activities.

DeVivo contends that the District Court committed reversible error in admitting evidence of DeVivo's prior dealings with the Government informant, Della Porta, on the grounds that the Government offered such evidence solely to prove DeVivo's criminal character or disposition. On the contrary, the transactions in question formed the background of, and were integrally related to, the conspiracy charged in the indictment. In addition, in the context of this counterfeit case, where DeVivo's fingerprints were found on the notes in question, the testimony was highly probative with respect to DeVivo's knowledge and intent and thus properly admissible on this basis as well. Judge Owen's decision to admit this evidence was a proper exercise of the District Court's broad discretion.

* Since LePore specifically requested an instruction below, LePore can not now suggest that any instruction to the jury only *exacerbated* the prejudice to him. The cases cited by LePore do not support such a proposition. In *Stewart v. United States*, 366 U.S. 1 (1961), the defendant had not requested a cautionary instruction. In *United States v. Hale*, *supra*, 422 U.S. at 175, n.3, affirming *United States v. Anderson*, 498 F.2d 1039 (D.C. Cir. 1974), the Court noted that the Government conceded the error was not harmless and that the appellate court had found the error not cured by the cautionary instruction given *sua sponte* by the trial court. Neither *Hale* nor *Anderson* remotely suggests a *per se* rejection of curative instructions.

The challenged evidence consisted primarily of testimony from the informant, Della Porta, and undercover agent Vezeris. Both Della Porta and Vezeris testified to the meetings with DeVivo leading up to the purchase of the \$9,800 in counterfeit federal reserve notes on March 9, 1977. These meetings included conspiratorial conversations about DeVivo's sale of approximately \$2 million dollars in counterfeit federal reserve notes. In testifying to the entire conversations with DeVivo, Della Porta and Vezeris also testified that DeVivo initially had proposed the sale of counterfeit U.S. Treasury bills. When the deal for the counterfeit U.S. Treasury bills fell through, DeVivo agreed to sell the counterfeit reserve notes.

Apparently DeVivo contends that the witnesses Della Porta and Vezeris should have been required to parse their testimony to eliminate references to the counterfeit U.S. Treasury bills. Since the evidence was probative in proving the background of the conspiracy, and in negating DeVivo's defense of lack of knowledge and innocent intent, there was simply no reason to expurgate the witnesses' conversation to delete references to counterfeit U.S. Treasury bills.

The law in this Circuit plainly permits introduction of relevant evidence relating to similar acts "unless offered solely to prove criminal character or disposition or the proffered evidence is of such a *highly* prejudicial nature as to *overwhelm* its probative value." *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (emphasis added). Once it is established that the evidence is probative, the District Judge can balance the probative value compared to its unfair prejudicial impact. *United States v. Benedetto*, Dkt. No. 77-1306, slip op. 1735 (2d Cir. Feb. 24, 1978); *United States v. Gubelman*, Dkt. No. 77-1279, slip op. 1747 (2d Cir. Feb. 24, 1978). Absent a clear abuse of discretion, the District Court's rulings on the admissibility of evidence will not be disturbed on appeal. *United States v. Braunig*, 553 F.2d 777, 781 (2d Cir.), *cert.*

denied, 431 U.S. 959 (1977); *United States v. Albergo*, 539 F.2d 860, 863 (2d Cir. 1976), *cert. denied*, 430 U.S. 1000 (1977). See also *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*); Rule 404(b), Fed. R. Evid.

The evidence in question showed the background of the conspiracy, and this Court has approved consistently the admission of evidence in conspiracy cases showing the background and development of the conspiracy because it is so probative of the existence of the conspiracy itself and the participation of the alleged conspirator.* The evidence in question, consisting primarily of the testimony of Della Porta, the informant, and agent John Vezeris, concerning meetings and conversations with DeVivo during the months immediately preceding the time period of the charged conspiracy to distribute \$2 million dollars in counterfeit federal reserve notes, was both highly probative and necessary to establish the background and development of the conspiracy.

Indeed, the evidence demonstrated that the various problems encountered in obtaining a genuine U.S. Treasury bill to use as a model for printing the counterfeit prevented the printing and the distribution of two million dollars worth of counterfeit U.S. Treasury bills and led directly to the agreement to distribute two million dollars in counterfeit \$100 federal reserve notes, *i.e.*, the con-

* There are numerous cases in this Circuit admitting similar act evidence to show the background and development of a conspiracy. See, e.g., *United States v. Moten*, 564 F.2d 620, 628 (2d Cir.), *cert. denied*, — U.S. — (1977); *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *United States v. Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Papadakis*, 510 F.2d 287, 294-295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Torres*, 519 F.2d 723 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States v. Del Purgatorio*, 411 F.2d 84, 86-87 (2d Cir. 1969).

spiracy charged. As this Court has recently stated, such evidence thus

"was clearly admissible to show the basis for the existence of the conspiracy charged and the mutual trust which existed between [Della Porta and DeVivo]. It was therefore admissible against all the defendants to show the nature and existence of the conspiracy charged."

United States v. Moten, 564 F.2d 620, 628 (2d Cir.), cert. denied, — U.S. — (1977). See also *United States v. Araujo*, 539 F.2d 287, 289 (2d Cir.), cert. denied, 429 U.S. 983 (1976). In other words, the evidence of the earlier negotiations between DeVivo and Della Porta was admissible to establish the existence and nature of their relationship, *United States v. Garelle*, 438 F.2d 366, 368 (2d Cir. 1970), cert. dismissed, 401 U.S. 967 (1971), and was "relevant to prove they could well have been continuing along the same line" in their subsequent counterfeit dealings, *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), cert. denied, 402 U.S. 999 (1971).*

In addition, this Court consistently has approved the admission of other crimes evidence as part of the Government's direct proof in cases, where, as here, knowledge and intent are at issue.** In the circumstances of this

* The evidence DeVivo challenges covered a time span from six months before the sale of the counterfeit reserve notes, and continued almost until the day the counterfeit was distributed. In *United States v. Magnano*, *supra*, the acts occurred nine years before the conspiracy charged in the indictment.

** The cases permitting the admission of such evidence in the Government's direct case are legion: See, e.g., *United States v. Cyphers*, 556 F.2d 630 (2d Cir.), cert. denied, 431 U.S. 972 (1977); *United States v. Kaufman*, 453 F.2d 306 (2d Cir. 1971); *United States v. Braverman*, 376 F.2d 249 (2d Cir.), cert. denied, 389 U.S. 885 (1967); *United States v. Johnson*, 382 F.2d 280 (2d Cir. 1967); *United States v. Klein*, 340 F.2d 547 (2d Cir.), cert. denied, 382 U.S. 850 (1965); *United States v. Robbins*, 340 F.2d 684 (2d Cir. 1965).

counterfeit case, where DeVivo's fingerprints were found on the counterfeit notes in question,* it was patent from the outset that DeVivo's knowledge and intent would be disputed. DeVivo himself denied that he knowingly had seen counterfeit money, had discussed counterfeit with anyone, or had given counterfeit money to Della Porta. DeVivo's counsel specifically argued in summation that DeVivo did not know how his fingerprints got on the counterfeit money and suggested that, in connection with a machinery rental, Della Porta, the informant, deliberately gave some of the counterfeit money to the unknowing DeVivo, who counted it and later, at Della Porta's demand, returned it to Della Porta. (Tr. 613). In the face of this anticipated and actual defense of lack of knowledge and criminal intent, it was essential for the Government to show DeVivo's course of dealings with Della Porta concerning counterfeit. As this Court clearly has stated, where circumstances of prior misdeeds were of a very similar nature to those at issue in the trial, the jury was entitled to assess "... the sheer improbability that a person with [defendant's] familiarity and experience with the specific criminal conduct charged ... might have performed the acts with an innocent and lawful intent." *United States v. Klein, supra*, 340 F.2d at 549.

Nor was the highly probative value of this evidence outweighed by the danger of improper prejudicial effect, in the sense that that term is used in Rule 404(b). The aggregate testimony showed a pattern of conspiratorial

* The Government provided the results of the fingerprint analysis to DeVivo's counsel in advance of trial. The Government fingerprint expert testified that two latent fingerprints were found on two of the counterfeit bills delivered on March 9, 1977, and that both belonged to DeVivo. During the direct examination of the same witness, DeVivo conceded that his fingerprints appeared on three of the counterfeit notes delivered on March 30, 1977. (Tr. 292-293, 300).

conduct of which the indictment charged merely a part; the prior criminal conduct showing the broader conspiracy was also admissible as relevant circumstantial evidence of the conspiracy charged, *United States v. Papadakis, supra*, 510 F.2d at 295. The "prejudice" of which Rule 404(b) speaks is thus not the harm caused to the defendant because the evidence is of great probative value on the issues presented by the case, but the danger that the jury will use such evidence for an improper purpose, such as to show criminal character, or to decide questions of fact on emotional grounds. *United States v. Robinson, supra*, 560 F.2d at 513-14. While the similar act of proof was convincingly relevant on the question of intent, it was in no way highly emotional evidence, the introduction of which could have aroused the jury's passions against defendant. See *United States v. Robinson, supra*; *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). Indeed, no physical evidence whatsoever was introduced in connection with the prior act testimony.

In sum, the record here makes apparent that Judge Owen's exercise of his broad discretion in admitting this proof was correct and by no stretch of imagination can be urged to have been arbitrary or irrational. *United States v. Robinson, supra*. DeVivo's broad-brushed attack on the introduction of the evidence therefore must be rejected.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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Southern District of New York,
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AFFIDAVIT OF MAILING

State of New York)

County of New York)

SS.:

deposes and says that JANE W. PARVER, being duly sworn,
she is employed in the office of
the United States Attorney for the Southern District
of New York.

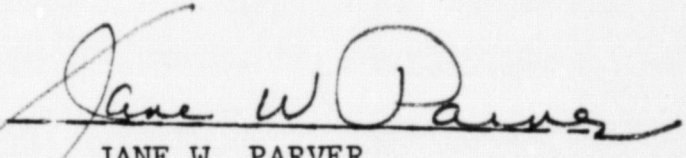
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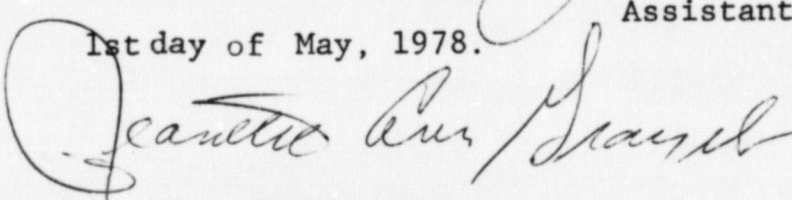
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And deponent further says that she sealed the said
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1st day of May, 1978.


JANE W. PARVER
Assistant U. S. Attorney


JEANETTE ANN GRAY
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979